

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	CRIMINAL ACTION NUMBERS
)	
v.)	IN-05-08-0192 thru IN-05-08-0198
)	
LINWOOD BLACK)	ID No. 0507017840
)	
Defendant)	

Submitted: November 29, 2005

Decided: February 10, 2006

MEMORANDUM OPINION

*Upon Motion of Defendant to Suppress Evidence - **DENIED***

Saagar B. Shah, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for the State

Nicole M. Walker, Esquire, of Wilmington, Delaware, attorney for the defendant

HERLIHY, Judge

Defendant Linwood Black moves to suppress evidence which was seized from his home pursuant to a search warrant. He argues that there was insufficient information in the warrant to establish probable cause. As a result of the evidence seized, Black has been charged with trafficking in heroin, possession with intent to deliver heroin, maintaining a dwelling for keeping controlled substances and other offenses.

There was no hearing in this matter as the issue is whether there was probable cause to support the issuance of the warrant.

The police obtained a search warrant for 203 W. 35th Street, Apartment #2 in Wilmington, and the persons of Black and Dorlanda Kelly:

That your affiants can state that during the fourth week of June 2005 a confidential source advised that a black male named Lynwood Black was selling and keeping heroin from within the address of 208 W. 35th Street, second floor apartment. They further advised that the named targets operated a light blue in color bearing PA registration FSA 6673. (*Registered to Dorlanda Kelly). This confidential source positively identified a WPD Ident Photo of Lynwood Black as one in the same as the heroin seller described above.

That your affiants can state that also during the fourth week of June visual surveillance was set up on the described address of 208 W. 35th Street, Apartment #2. Lynwood Black was positively identified leaving the described residence and locking same with keys. The described target vehicle was also observed (sic) parked directly in front of the residence.

That your affiants can state that a criminal history check was conducted for the described target, Lynwood Black. Lynwood Black pled guilty on 05-04-1988 to the charge of possession of a controlled substance w/in 1000 feet of a school. Lynwood Black is thus a convicted felon. His criminal history also reads caution codes: sells heroin in Riverside and will resist may be armed.

That your affiants can state that during the first week of July 2005 they received a City of Wilmington Risk Tracker Drug Complaint in reference to the address of 208/210 W. 35th Street, Wilmington (Rental Properties). The complaint was originally dated 24 June 2005. The complaint reads as follows: A young man is selling drugs out in plain view — walking up to cars either parked in front of the property also using side steps/banister to exchange drugs — very concerned about the young children/residents of this area/several owners on this block cannot park their vehicles in front of their property/or pull into their driveways because of the excessive traffic/drug issue.

A confidential informant regarding drug activity in the City on 14 July 2005 (sic) Detectives Janvier, Ross, and Handy met with of Wilmington (sic). Hereafter the confidential informant will be referred to as CI#1. Officers received information through this described confidential informant and through the City of Wilmington Task Tracker regarding drug sales at 208 W. 35th Street, Apartment #2. This informant was met for the purpose of securing a controlled purchase of heroin from Lynwood Black, BMN 01-17-1979. This address is in the City of Wilmington, County of New Castle, State of Delaware. CI#1 agreed to attempt the controlled purchase and was first searched for any contraband and U.S.C., said search ended with negative results. CI#1 was then provided with Departmental Buy Money, Serial #EB24082030B, and AF48205524D. CI#1 was then followed into the area of the target location. CI#1 was then directed to attempt to purchase heroin from this location.

Surveillance was set up on the target address prior to CI#1 responding (sic) into the area. The known target, Lynwood Black exited the target residence at approximately 2015 hours wearing a white shirt, long blue jean shorts, with a black hat on his head. The target walked westbound on 35th Street and southbound on Jefferson Street. The target stopped at 34th Street on the west side of the street where he met CI#1. At approximately 2018 hours the target handed CI#1 an unknown small item(s) in exchange for Departmental Buy Money. CI#1 and the target were then followed out of the area, the CI#1 back to the predetermined meet location and the target Lynwood Black back to his residence at 208 W. 35th Street, Apartment #2. Upon arrival back at the meet location CI#1 handed Detective Janvier four, clear plastic bags each containing blue glassine bag stamped “Fire”, each containing a tan chalky substance, with an approximate total weight of .08 grams, suspected to be heroin. CI#1 was then re-searched for contraband

and U.S.C which met with negative results. CI#1 was debriefed and stated that they made a phone call to Lynwood Black and told him they needed \$40.00 worth of heroin. Black advised to meet him in the area of 34th and N. Jefferson Street.

Black further advised that his house is hot with police right now. CI#1 advised that they responded to this area and were met by Lynwood who was wearing a white t-shirt, blue jeans, and a black hat. They conducted the transaction drugs for the Departmental Buy Money, and then Lynwood was taken home.

The suspected heroin was field tested by Detective Janvier and the test was positive for the presence of heroin. The approximate weight of this item was .08 grams. These items were tagged and entered into evidence under the supervision of Det. Sgt. Liam Sullivan.¹

The search was conducted on July 18, 2005, four days after the controlled buy. Black argues that the 1998 conviction is very stale and cannot form the basis for probable cause. He also argues that even the information about alleged activities in June is stale and cannot be used to establish probable cause. Black mentions certain police activity earlier in the day on July 18th, but the Court sees no relevance to it and, of course, there was no hearing to present it under oath.

An affidavit, within its “four corners,” must establish probable cause.² The affidavit supporting this search warrant “is considered as a whole and not on the basis of separate allegations.”³ When there is probable cause, a search warrant is directed at the

¹ Probable Cause statement.

² *Gardner v. State*, 567 A.2d 404, 411 (Del. 1989).

³ *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984), citing *Dunfee v. State*, 346 A.2d 173, 175 (Del. 1975).

property where the instrumentalities or evidence of crime are to be found.⁴ To establish probable cause, it is not necessary to have firsthand knowledge that the items listed are actually located in the place to be searched.⁵ A review of probable cause determination is viewed with great deference and not on hyper-technical analysis of its separate allegations.⁶ An affidavit in support of a search warrant is sufficient if it “set[s] forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found in a particular place.”⁷

Of course, by itself, Black’s seven year old conviction is stale and could not establish probable cause. But, the defendant’s emphasis on that point is misplaced since it must be viewed on the context of the whole affidavit. His staleness argument is also directed at the June 2005 information.

He cites as support for his staleness claim *Sgro v. United States*.⁸ *Sgro* holds that “proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.”⁹ Black further argues that “[t]he prime

⁴ *United States v. Conley*, 4 F.3d 1200, 1207 (3d. Cir. 1993).

⁵ *Dorsey v. State*, 761 A.2d 807, 813 (Del. 2000).

⁶ *Smith v. State*, 887 A.2d 470, 473 (Del. 2005) citing *Blount v. State*, 511 A.2d 1030 (Del. 1986).

⁷ *Fink v. State*, 817 A.2d 781, 787 (Del. 2003).

⁸ 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932).

⁹ *Sgro*, 287 U.S. at 210, 53 S.Ct. at 140, 77 L.Ed. 260 (1932).

element in the concept of probable cause is the time of the occurrence of the facts relied upon.’”¹⁰ He also asserts that the passage of time diminishes the reliability of information that may initially support the issuance of a search warrant.¹¹ He urges this Court to adopt the holding in *Pennsylvania v. Tolbert*,¹² that the actions observed by a police officer during surveillance, although suspicious, fall far short of evidence of a probability of continuing criminal activity.¹³ Black adds that there was no information before the issuing judge supporting the inference that circumstances in the subject apartment had not changed in the time since the complaints.¹⁴ He concludes this argument by claiming that there was no activity strongly suggesting continuing criminal conduct.¹⁵

Temporal proximity is determined on an *ad hoc* basis in light of the circumstances of each case.¹⁶ All the facts and circumstances of the case determine whether the complaint for the search warrant is too remote in time.¹⁷ In determining whether the

¹⁰ *Pierson v. State*, 338 A.2d 571, 573 (Del. 1975) (quoting *Fowler v. State*, 172 S.E.2d 447 (GA. App. 1970)).

¹¹ *State v. Pulgini*, 374 A.2d 822, 823 (Del. 1977).

¹² 424 A.2d 1342, 1344 (Pa. 1981).

¹³ *Id.*

¹⁴ *People v. De Jesus*, 480 N.Y.S.2d 807, 810 (N.Y. Sup. 1984).

¹⁵ *People v. Damian*, 701 N.E.2d 171, 173 (Ill. Div. 1 Dist. 1998).

¹⁶ *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984).

¹⁷ *Damian*, 701 N.E.2d at 173.

information relied upon to issue a search warrant was stale or not, the Court must first look to the dates in the affidavit.¹⁸

Under probable cause (B), it is stated that a confidential source advised police that Black was selling and keeping heroin in his residence at 208 W. 35th Street. According to (C), surveillance on that location was set up during the fourth week in June. (E) mentions that the Wilmington police also received during the first week in July 2005 a complaint dated June 24, 2005. (F) covers the controlled buy on July 14, 2005. There is chronology in the affidavit.¹⁹ *Jensen* held that it is enough that the date of the occurrence is provided and the events were presented in a logical sequence.²⁰ The Court in *Jensen* continued that it believed that the lapse of 27 days was so great to invalidate the warrant as a matter of law.²¹ Here, the time lapse between June 24 and July 18 is 23 days. This lapse will not invalidate the Black search warrant as a matter of law. This is not even considering the controlled buy four days prior to the issuance of the search warrant. The time lag was not close to the six-week delay in the issuance of the search warrant in *Damian*. Unlike the lapse of almost a month between the controlled buy and issuance of

¹⁸ Page 2 of the Affidavit is missing from the documents provided to the Court and is not in the file.

¹⁹ *Pierson*, 338 A.2d at 573.

²⁰ *Jensen*, 482 A.2d at 112.

²¹ *Id.*

the search warrant in *Rodriguez*,²² here only four days elapsed between the controlled buy and the application and issuance of the search warrant.

Black also declares that the search warrant lacked probable cause that drugs were then located at 208 W. 35th Street. Black claims that the police did not observe him conducting drug sales from his residence. He argues, therefore, that no nexus exists between the drug sales and his residence. He contends that there needs to be direct information that the sale actually occurred in his apartment to connect the drugs to his apartment.²³ The controlled buy was within a block of Black's residence. The probable cause states that a confidential informant said that Black sold drugs from and kept drugs in his apartment. There was also the June 24 complaint asserting that a young man was selling drugs at the location. The location of the purported drug sales did not change from the initial information from the confidential informant through the controlled buy.²⁴

The affidavit indicates the purchasing confidential informant contacted Black by phone at his residence. Black told that informant there was a lot of police activity around the house and arranged to meet the informant nearby. As the affiant explains, drug traffickers do not carry their stashes around with them but carry just enough for the sale

²² *State v. Rodriguez*, Del.Super., ID No. IN-05-03-0927 to 0930, Herlihy, J (June 20, 2005).

²³ *Minnesota v. Cavegn*, 356 N.W.2d 671, 674 (Minn. 1984).

²⁴ *Gardner v. State*, 567A.2d 404, 410 (Del. 1989), *cert. denied*, 494 U.S. 1067 (1990).

while keeping the stash at a secure location, such as a residence²⁵ The affiant is, as the affidavit shows, an experienced drug investigation.²⁶

The sum of the information in the search warrant was and is sufficient to establish probable cause. The information formed a continuum sufficient to keep it fresh and to justify a search of Black's person and residence.

Conclusion

For the reasons stated herein, defendant Linwood Black's motion for suppression is **DENIED**.

IT IS SO ORDERED.

J.

²⁵ Affidavit Paragraph 10 I.

²⁶ *Id.*, Paragraph 7A.